No. 96-174

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1996

ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW, ET AL.,

*Petitioners,*

v.

EDWIN EDWARDS, ET AL.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## BRIEF IN OPPOSITION OF RESPONDENTS, EDWIN EDWARDS, ET AL.

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## BRIEF IN OPPOSITION

Edwin Edwards, in his official capacity as Governor of the State of Louisiana, J. Christopher Pilley, in his official capacity as Secretary of the Louisiana Department of Health and Hospitals, and T. Jay Ray, in his official capacity as Administrator of the Safe Drinking Water Program,[1] respectfully represent:

## STATEMENT OF THE CASE

Petitioners herein seek review by this Court of a decision by the United States Court of Appeals for the Fifth Circuit which reversed a decision by the United States District Court for the Eastern District of Louisiana awarding attorney's fees to petitioners in a "citizen's suit" brought pursuant to the Lead Contamination Control Act of 1988 ("LCCA"), 42 U.S.C. § 300j-21 *et seq.* In reversing the award of attorney's fees, the Fifth Circuit held that respondents ("Louisiana" or "State") were not in violation of any lawful requirement of the LCCA when suit was filed, hence the District Court's award of attorney's fees was improper. *ACORN v. Edwards,* 81 F.3d 1387, 1395 (5th Cir. 1996). This decision was based upon two findings: (1) Louisiana had complied with the provisions of 42 U.S.C. § 300j-24(c) at the time this litigation was commenced and (2) 42 U.S.C. § 300j-24(d) was violative of

[1] Since the filing of suit, Mike Foster has become the Governor of the State of Louisiana, Bobby Jindal has become the Secretary of the Louisiana Department of Health and Hospitals and Lovis Wales has become the Administrator of the Safe Drinking Water Program.

the Tenth Amendment of the United States Constitution as falling squarely within the holding of *New York v. United States*, 505 U.S. 144 (1992).

This decision by the Fifth Circuit conforms completely with prior decisions by this Court and is not in conflict with any decision of any other Court of Appeals. Hence, it does not warrant review by this Court.

## A. STATEMENT OF FACTS

In 1988, Congress enacted the Lead Contamination Control Act as an amendment to the Safe Drinking Water Act ("SDWA"), 42 U.S.C. § 300f, *et seq.*, to address concerns that children were being exposed to lead in drinking water at school. Though Congress commanded action by both the United States Environmental Protection Agency ("EPA") and the States, Congress placed the most substantial obligations upon the States.

EPA's obligations under the statute are minimal. Congress instructed EPA to publish a guidance document and testing protocol designed to assist schools in determining the source and degree of lead contamination in drinking water systems. 42 U.S.C. § 300j-24(b). Additionally, 42 U.S.C. § 300j-23(a) required EPA to publish a list of brands and models of drinking water coolers which were not lead free. Congress directed EPA to distribute the guidance document and list to the States. 42 U.S.C. § 300j-24(a)-(b).

Congress put a much greater burden on the States. It commanded the States to disseminate the guidance document and testing protocol and the list of non-lead-free

water coolers to local educational agencies, private non-profit elementary or secondary schools and day care centers (collectively, "LEA's"). 42 U.S.C. § 300j-24(c). Moreover, Congress mandated, without providing any alternative, that each State establish an extensive and costly regulatory program to provide for the removal of lead contaminants from school drinking water systems. 42 U.S.C. § 300j-24(d)(1) and (3). Notwithstanding 42 U.S.C. § 300j-25(c), which authorized the appropriation of funding in the amount of $30,000,000 for each fiscal year from 1989 to 1991 to be used by EPA to "make grants to states to establish and carry out state programs under section 300j-25(a)", Congress never appropriated any funds for those purposes. Even though federal funds were never provided, Louisiana and other states nonetheless established the federally mandated programs.

Pursuant to its LCCA obligations,[2] EPA prepared its Guidance Document and Testing Protocol ("Guidance Document") in January 1989 and published a "notice of availability" regarding the Guidance Document in the *Federal Register* on April 10, 1989. 54 Fed. Reg. 14,320 (April 10, 1989). EPA also published a proposed list of non-lead-free drinking water coolers on that same day. 54 Fed. Reg. 14,316 (April 10, 1989). The final list of non-lead-free water coolers was not published until January 18, 1990, 55 Fed. Reg. 1,772 (the "final list") – 13 days

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[2] As usual, Congress imposed hopelessly optimistic deadlines upon EPA for issuing guidance documents and protocols and final lists and impossible deadlines upon the States for establishment and implementation of the federally required, but State conducted remedial programs.

prior to the deadline for the States to have completed implementing the program – and a copy was not provided to Louisiana until it was sent by letter dated February 14, 1990. In February 1990 EPA also issued a "Fact Sheet" which included a complete list of the water coolers designated as non-lead-free in the final list published in the *Federal Register*, plus seven additional water coolers which had been on the initially proposed list.

Louisiana attempted to comply with the federal mandate by establishing its LCCA Program in 1989, long before this suit was filed. It published a document entitled "Louisiana's Implementation of the Federal Lead Contamination Control Act of 1988" on November 1, 1989 and distributed it to the LEA's. Louisiana's LCCA Program included State funding of the testing of drinking water sources at schools, distribution of information and questionnaires, establishment of a working group to assist schools in lead contamination detection, training of day care and school personnel, drinking water quality monitoring, and opportunity for LEA's to discuss or arrange for removal of sources of lead contamination.

Louisiana also disseminated the EPA Fact Sheet prior to filing of this suit. The EPA Fact Sheet contained the brand names and model numbers of all of the non-lead-free water coolers listed in EPA's final list. Subsequent to the filing of this suit, even though Louisiana had previously distributed the entirety of the relevant, required information regarding non-lead-free water coolers, it nonetheless distributed an exact duplicate of the final list.

## B. PROCEDURAL HISTORY OF THIS CASE

The Association of Community Organizations for Reform Now ("ACORN") sent a notice of intent to file a citizen's suit ostensibly as required by 42 U.S.C. § 300j-8(b)(2), which was received by the State on February 14, 1993. Prior to the filing of suit, on or about April 5, 1993, the State distributed to the LEA's the EPA Fact Sheet which contained all the information required by 42 U.S.C. § 300j-24(c).[3] Shortly after, ACORN sued several State officials in their official capacities asserting only that the State had failed to establish a remedial action program under 42 U.S.C. § 300j-24(d).[4] Later, ACORN

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[3] (c) Dissemination to schools, etc.

Each State shall provide for the dissemination to local educational agencies, private nonprofit elementary or secondary schools and to day care centers of the guidance document and testing protocol published under subsection (b) of this section, together with the list of drinking water coolers published under section 300j-23(a) of this title.

42 U.S.C. § 300j-24(c).

[4] (d) Remedial action program

(1) Testing and remedying lead contamination

Within 9 months after October 31, 1988, each State shall establish a program, consistent with this section, to assist local educational agencies in testing for, and remedying, lead contamination in drinking water from coolers and from other sources of lead contamination at schools under the jurisdiction of such agencies.

* * *

amended its complaint alleging a violation of 42 U.S.C. § 300j-24(c), arguing that Louisiana's distribution of the EPA Fact Sheet did not comport with 42 U.S.C. § 300j-24(c) because it had not been "published" in the *Federal Register* or, in other words, it was not an exact duplicate of the *Federal Register* final list.

The State moved for dismissal based on lack of subject matter jurisdiction or, in the alternative, for summary judgment alleging that the notice of intent to sue was inadequate and the plaintiff had no standing. The District Court denied these motions. The State then moved for reconsideration arguing that if the alleged violations of LCCA could be the basis for a citizen's suit, then the LCCA violated the Tenth and Eleventh Amendments to the United States Constitution. This motion was also denied.

Following dismissal by the District Court of all its claims as moot, ACORN filed a motion for attorney's fees

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(3) Coolers

In the case of drinking water coolers, such program shall include measures for the reduction or elimination of lead contamination from those water coolers which are not lead free and which are located in schools. Such measures shall be adequate to ensure that within 15 months after October 31, 1988, all such water coolers in schools under the jurisdiction of such agencies are repaired, replaced, permanently removed, or rendered inoperable unless the cooler is tested and found (within the limits of testing accuracy) not to contribute lead to drinking water.

42 U.S.C. § 300j-24(d)(1) and (3).

which the District Court granted, finding that ACORN had shown that "their lawsuit was a significant catalyst or substantial factor" in inducing Louisiana to comply with the LCCA.

The State appealed the award of attorney's fees. On appeal, and at oral argument, the Court of Appeals for the Fifth Circuit requested supplemental briefing on the constitutional issues raised by the State. In the decision below, the Court of Appeals reversed the award of attorney's fees, holding that there was no violation of a lawful statutory provision at the time the citizen's suit was filed; therefore, ACORN was not entitled to an award of attorney's fees.

## SUMMARY OF ARGUMENTS FOR DENYING WRIT

The Fifth Circuit's decision was factually correct and well reasoned. This Court should not waste its resources on a case which does not present any compelling reasons for review. That portion of the decision of the Court of Appeals finding that the award of attorney's fees could not be based upon the alleged violation of 42 U.S.C. § 300j-24(c) – the alleged failure to send out the final list – was a factual finding supported by the record and does not warrant review. The holding that 42 U.S.C. § 300j-24(d) was unconstitutional is completely in keeping with the current jurisprudence of this Court, *New York v. United States*, 505 U.S. 144 (1992). No Court of Appeals has rendered a decision in conflict with any component of the Fifth Circuit's decision.

## ARGUMENT

### I. This case does not raise special and important issues for review because the Fifth Circuit correctly held that the State had not violated any lawful requirement of the LCCA, and, therefore, the award of attorney's fees was unwarranted.

#### A. Louisiana had complied with the requirement of 42 U.S.C. § 300j-24(c) of the LCCA by distributing the EPA Fact Sheet which contained all of the information specified in the statute.

In reversing the District Court's decision, the Fifth Circuit concluded that distribution of the EPA Guidance Document and the EPA Fact Sheet constituted compliance with 42 U.S.C. § 300j-24(c) which directs states to disseminate the Guidance Document and the EPA list of non-lead-free drinking water coolers to the LEA's. *ACORN v. Edwards*, 81 F.3d 1387, 1392 (5th Cir. 1996).[5] Though the State did not disseminate an exact duplicate of the actual *Federal Register* notice, it did distribute the information required by the statute. The Court of Appeals found this to be at most a technicality that was "inconsequential, in that the entities receiving the Fact Sheet were encouraged to be more, rather than less, cautious in determining

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[5] The EPA Fact Sheet contained all of the brands and models listed in EPA's final list published in the *Federal Register* and seven others. *ACORN v. Edwards*, 81 F.3d 1387, 1391 n.9. Moreover, the EPA Fact Sheet directed persons seeking additional information to the *Federal Register*. *ACORN v. Edwards*, 81 F.3d 1387, 1392 n.11. Any additional information contained in the *Federal Register* notice was not information required to be included in the list of non-lead-free drinking water coolers to be distributed by the State.

which drinking water coolers in their possession posed a health risk." *Id.* at 1392. Further "[d]efendants erred in favor of the State's school children, the ultimate beneficiaries of the LCCA, and we see no reason to penalize the State for such an innocuous transgression." *Id.* at 1392.

Therefore, the Fifth Circuit correctly held that defendants had not violated 42 U.S.C. § 300j-24(c).[6] This Court's own rules state that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings . . . " *S.Ct. R. 10.* Surely, the well reasoned factual finding of the Fifth Circuit on this issue does not serve as a compelling reason for review by this Court.

**B. 42 U.S.C. § 300j-24(d) was properly held unconstitutional as violative of the Tenth Amendment and thus any alleged failure by Louisiana to comply with such a provision cannot serve as the basis for an award of attorney's fees.**

The Fifth Circuit held that 42 U.S.C. § 300j-24(d), which mandated States to establish and implement the LCCA required programs, violated the Tenth Amendment, following this Court's decision in *New York v. United States,* 505 U.S. 144 (1992). *ACORN v. Edwards,* 81 F.3d 1387, 1395 (5th Cir. 1996). In its decision, the Court of Appeals merely applied the law recently enunciated by this Court. Its decision is not in conflict with any decision of this Court or with that of any Court of Appeals on this issue.

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[6] The Court of Appeals did not find 42 U.S.C. § 300j-24(c) unconstitutional as it did not need to reach that issue. *ACORN v. Edwards,* 81 F.3d 1387, 1390-1392 (5th Cir. 1996).

Its holding that 42 U.S.C. § 300j-24(d) was an unconstitutional intrusion upon state sovereignty is completely in keeping with *New York v. United States*, 505 U.S. 144 (1992). The Fifth Circuit properly focused on the pivotal issue of "whether the method of regulation chosen by Congress in § 300j-24(d) impermissibly intrudes upon State sovereignty."[7] *ACORN v. Edwards*, 81 F.3d 1387, 1393 (5th Cir. 1996). Here, as in *New York*, the statute offered no alternative to establishing and implementing this federally mandated program. Louisiana could either establish and fully implement the prescribed program or face enforcement litigation such as that filed by ACORN. This is, in the words of Justice O'Connor, "no choice at all". *New York v. United States*, 505 U.S. 144, 175-176 (1992).

Petitioners convey the impression that 42 U.S.C. § 300j-24(d) imposed only a minimal requirement upon Louisiana. To the contrary, Louisiana was *without any choice at all* whether to establish an extensive and costly program to test for and remedy lead contamination from water coolers *and* other drinking water sources at all schools in the state,[8] to reduce or remediate lead contamination from non-lead-free water coolers, and to "repair, replace, permanently remove or render inoperable" each non-lead-free water cooler prior to January 31, 1990

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[7] Louisiana maintains that Congress can regulate movement of lead contaminated drinking water coolers in interstate commerce, but that it has to effect such regulation upon persons, not states, and consequently, could not, without more, require states to develop complex remedial programs.

[8] There are more than 20,000 water coolers at schools in Louisiana which would have to be tested and possibly replaced, which is certainly no modest or inexpensive undertaking.

unless each cooler was tested and found not to contribute lead to drinking water. 42 U.S.C. § 300j-24(d)(1) and (3). This is not somehow a *minimal* program requiring only insignificant assistance to local educational agencies.[9] Instead, it is a Congressionally imposed requirement "directly compelling [States] to enact and enforce a federal regulatory program, an outcome that has never been understood to lie within the authority conferred upon Congress by the Constitution." *New York v. United States,* 505 U.S. 144, 175-76 (1992). Given the threat of civil enforcement, including the threat of citizen suits pursuant to 42 U.S.C. § 300j-8(a), the State's only choice was to succumb to this federal mandate and regulate according to its instruction.[10] *ACORN v. Edwards,* 81 F.3d 1387, 1394 (5th Cir. 1996).

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[9] The legislative history of 42 U.S.C. § 300j-24(d) is instructive of the "minimal" effort required of the States:

> These programs are to encompass efforts to eliminate all sources to lead contamination in school drinking water, including lead solder and lead pipes in school plumbing, lead service lines, and lead containing water coolers. The Committee also expects such programs to include efforts to secure the water supplier's cooperation in lowering the corrosivity of the drinking water, and therefore its tendency to leak lead.

1988 U.S.C.C.A.N. 3793, 3804 (1988).

[10] In fact, Louisiana took significant actions to protect its school children. In addition to disseminating more than the statutorily required information, it established an elaborate testing and remedial program. Indeed, ACORN's complaint did not allege failure of the State to *establish* a program, but instead questioned its *implementation.*

The Fifth Circuit's decision on this point is wholly consistent with *New York* and the constitutional limitations historically attached to congressional exercise of its interstate commerce power. The critical alternative lacking in the statute is any option to decline to administer the federal program. Absent the option to decline, and given the extensive and costly regulatory program necessary to implement 42 U.S.C. § 300j-24(d), this provision of the LCCA constitutes an unconstitutional intrusion upon state sovereignty. The Fifth Circuit's analysis is sound and in line with this Court's Tenth Amendment jurisprudence. The arguments of the petitioners do not present important or compelling reasons to review this holding of the Fifth Circuit.

## II. A citizen suit is not permitted, nor is a plaintiff in such a suit entitled to an award of attorney's fees under 42 U.S.C. § 300j-8(d), when there is no violation of any lawful statutory requirement.

42 U.S.C. § 300j-8(a) provides that "any person may commence a civil action . . . against any person . . . who is alleged to be in violation of any requirement" of the LCCA. 42 U.S.C. § 300j-8(a). The pivotal language is "in violation of any requirement." While 42 U.S.C. § 300j-8(d) permits the award of attorney fees, neither a citizen suit nor attorney's fees are authorized for wholly past violations of a statute. See e.g., *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Fdtn.*, 484 U.S. 49, 64 (1987) (holding that a similar citizen suit provision of the Clean Water Act does not permit citizen suits for wholly past violations). As stated by this Court in that case:

> [T]he purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen's suit.

*Id.* at 60; see also *Hallstrom v. Tillamook County*, 493 U.S. 20, 29 (1989) (where this Court interpreted a similar 60 day notice period as intended to give "alleged violators" a 60 day non-adversarial period to achieve compliance).

Here, the Fifth Circuit correctly held that Louisiana was not in violation of any lawful requirement of the LCCA at the time suit was filed. *ACORN v. Edwards*, 81 F.3d 1387, 1395 (5th Cir. 1996). Consequently, the citizen's suit provision of the LCCA neither permits such a suit to be prosecuted nor supports an award of attorney's fees. Furthermore, petitioners have cited no case in which a party was awarded attorney's fees for instituting suit under a similar statutory provision when no violation of that statute existed at the time of filing.

## CONCLUSION

For the foregoing reasons, review by this Court is not necessary or appropriate and the writ of certiorari should not issue.

Respectfully submitted,

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